91-1073

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ARIZONA,

Petitioner,

vs.

MICHAEL DUANE MULLET,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Michael Duane Mullet, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the decision of the Arizona Court of Appeals entered on March 19, 1991.

OPINION BELOW

Respondent Michael Duane Mullet filed a special action in the Arizona Court of Appeals for Division Two upon the denial of his motion to dismiss a criminal indictment on double jeopardy grounds. The facts giving rise to the motion to dismiss, and as outlined by the Arizona Court of Appeals, are as follows. On

January 24, 1990, the Arizona Corporation Commission conducted a hearing concerning allegations that Respondent sold unregistered securities and engaged in various other fraudulent acts in violation of Arizona securities statutes. Respondent was subsequently criminally indicted on March 22, 1990, on the same acts which gave rise to the proceedings before the Corporation Commission. On November 6, 1990, Respondent filed a motion to dismiss the criminal charges on the basis that the double jeopardy clause of the United States and Arizona Constitutions had been violated. On November 29, 1990, the Arizona Corporation Commission issued a final order directing Respondent to cease and desist his trading activities, to pay more than $400,000.00 restitution to various investors, and to pay an administrative penalty of $380,000.00.

The trial court ruled that Respondent's double jeopardy protections against multiple prosecutions and multiple punishments had not been violated. Upon review of this decision by special action, the Arizona Court of Appeals ruled that Respondent's right to be free from multiple prosecutions had not been violated, as the proceedings before the Corporation Commission did not have the indicia of a prosecution. The Court of Appeals further determined, however, that "if the administrative penalty of $380,000.00 is purely punitive as opposed to remedial, the fact that it was imposed in an administrative proceeding, as opposed to a civil or criminal proceedings, does not change its nature. A cow after all, does

not become a horse simply by calling it a horse. As in Halper, we are unable to determine from the record before us, which does not contain an accounting of the state's damages, whether the administrative penalty is rationally related to making the state whole in connection with the proceedings before the Commission." The Court of Appeals remanded the matter to the trial court for further evidentiary proceedings concerning the characterization of the $380,000.00 administrative penalty as remedial or punitive.

The Petitioner filed a Petition for Review of the Arizona Court of Appeals' decision to the Arizona Supreme Court prior to conducting any further evidentiary hearings in the trial court as directed by the Court of Appeals. The Petition for Review was denied without comment by the Arizona Supreme Court on September 25, 1991.

STATEMENT OF THE CASE

Respondent Michael Mullet, developed a computer program which he believed could accurately predict the most opportune times to trade on the foreign currency futures market. Mullet convinced several investors of the viability and profitability of this computer program, and received various sums of money over a several month period from these investors for the purposes of trading. Needless to say, Mullet's computer program and human input were not the gold mine he and his investors had hoped it would be, and substantial sums of money were lost. According to allegations by the State, not only did Mullet lose the investors' money, he misled the investors into believing that the computer program was generating substantial profits, thus inducing the investors to invest additional funds in the program.

After receiving various complaints by investors, the Arizona Corporation Commission, represented by the Arizona Attorney General, conducted a public hearing concerning Mullet's various acts on January 24, 1990, with a final order issued on November 28, 1990. On March 22, 1990, Mullet was criminally indicted for the same acts which had been presented to the Corporation Commission. The State at all times during the pendency of the criminal proceedings has been represented by the Arizona Attorney General's Office.

Mullet's motion to dismiss the criminal proceedings was denied by the trial court. The Arizona Court of Appeals, upon review by way of a petition for special action, remanded this

matter to the trial court for further evidentiary proceedings on March 19, 1991. Review of that decision was denied by the Arizona Supreme Court on September 25, 1991. The trial court stayed further proceedings in this matter to allow the State to petition the United States Supreme Court for certiorari.

On January 8, 1992, Mullet was indicted in the United States District Court for Arizona for violations of various federal criminal statutes as the result of the same actions which were the subject of the Arizona Corporation Commission proceedings and Arizona criminal proceedings.

JURISDICTIONAL STATEMENT

The Petitioner has cited 28 U.S.C. §1254(a) as authorization for this Court's jurisdiction to review the Arizona Court of Appeals' decision rendered on March 19, 1991. 28 U.S.C. §1254(a) pertains to this Court's jurisdiction to entertain writs of certiorari arising in the various United States Courts of Appeals. This matter comes before this Court as the result of the denial of a petition for review by the Arizona Supreme Court. This Court's jurisdiction over state court decisions is grounded in 28 U.S.C. §1257, which provides that only final judgments of the State's highest court may be reviewed by a petition for certiorari.

In the instant case, a final judgment has not been rendered by Arizona's highest court. Upon a petition for special action, the Court of Appeals of Arizona remanded this matter to the trial court for a further evidentiary hearing to determine whether the $380,000.00 administrative penalty assessed against Respondent should be properly characterized as punishment or as remedial in nature. The decision of the Arizona Court of Appeals was presented by the Petitioner to the Arizona Supreme Court upon a petition for review, without benefit of first conducting the evidentiary hearing at the trial court level. This petition for review was denied by the Arizona Supreme Court without comment.

In U.S. v. Halper, 490 U.S. 435, 104 L.Ed.2d 487 (1989), 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), this Court remanded the matter to the trial court for the exact determination which has

been left open in this case; whether the penalty assessed is remedial or punitive. Without a decision by the Arizona trial court concerning this issue, and consequently the Arizona appellate courts, review of the issue by this Court would be premature.

The general rule concerning finality of state court criminal proceedings requires that the prosecution be concluded by a judgment of conviction and imposition of sentence. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989). The instant matter has not been concluded by conviction and sentence, and therefore this Court's jurisdiction would generally be precluded.

Exceptions have been created to the finality rule requiring conviction and sentence, however these exceptions are inapplicable here. These exceptions were delineated in the case of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) and are predicated on the requirement that at a minimum the federal question has been finally determined by the highest state court. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, Flynt v. Ohio, 451 U.S. 619, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981). This threshold requirement has not been met in the instant case. The Arizona Court of Appeals has made a preliminary determination that the $380,000.00 administrative penalty may constitute punishment as opposed to a remedial measure. Rather than drawing such a conclusion without benefit of a proper evidentiary basis, the Arizona Court of

Appeals remanded the matter to the trial court. The Arizona Supreme Court's denial of the petition for review is consistent with the necessity for a further evidentiary foundation. The Arizona courts may ultimately conclude that the arguments advanced by the Petitioner concerning the appropriate definition and calculation of damages are correct, thus rendering this Court's review of the Petitioner's arguments unnecessary. Under the present circumstances, Petitioner is asking this Court to render an advisory opinion in a vacuum, and jurisdiction should therefore be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:
...Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

United States Constitution Amendment XIV:
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law...

REASONS FOR DENYING WRIT

A. The Imposition of a $380,000.00 Penalty by the Arizona Corporation Bars Criminal Prosecution of Respondent.

The Petitioner has cited the case of Jones v. Thomas, _____ U.S. _____, 109 S.Ct. (1989), for the proposition that Respondent would receive an "unjustified windfall" if the State is precluded from criminally prosecuting Respondent on double jeopardy grounds. The Petitioner also argues that Respondent can be punished again, under the authority of Jones v. Thomas, as long as the total punishment imposed does not exceed the total punishment authorized by the legislature in both the civil and criminal contexts. Petitioner misconstrues the holding in Jones v. Thomas, which is readily distinguishable from the instant case.

In Jones v. Thomas, supra, the defendant received two consecutive sentences subsequent to a single criminal trial. After the original sentencing it was determined that the trial court had erred, and consecutive sentences were not permitted

under the law. This Court held that the trial court properly credited the defendant for time served on the longer sentence as a result of the completion of the shorter sentence, and that the trial court was not required to totally release the defendant to avoid double jeopardy problems.

In the instant case the potential of double punishment does not arise as the result of one proceeding, but rather as the result of two distinct proceedings. It has been the Respondent's contention and the Court of Appeal's conclusion that the existing order of the Corporation Commission requiring the payment of $380,000.00 as an "administrative penalty" is a possible punishment barring criminal prosecution in a criminal trial which has yet to take place. The United States Supreme Court addressed this issue in the case of United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), as follows:

> "That the Government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. Since a legislature may authorize cumulative punishment under two statutes for a single course conduct, the multiple punishment inquiry in the context of a single proceedings focuses on whether the legislature actually authorized the cumulative punishment. See Ohio v. Johnson, 467 U.S. 493, 499-500 [104 S.Ct. 2536, 2540-2541, 81 L.Ed.2d 425] (1984). On the other hand, when the Government has already imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." Supra, at 109 S.Ct. 1903.

The Petitioner seeks to characterize the ruling in Halper, as applicable only when a civil proceeding follows a criminal proceeding. Although this was the fact pattern in Halper, nothing in the Halper opinion limits its validity to the Petitioner's interpretation. The crucial holding in Halper is that the government cannot "punish" an individual in more than one proceeding, whether the first proceeding is criminal, civil or administrative in nature.

The argument that a defendant should not be entitled to an "unjustifiable windfall" is also inapplicable here. Petitioner, as represented by the Attorney General's Office, chose to conduct evidentiary hearings before the Arizona Corporation Commission concerning the various alleged activities of Respondent. These same activities later became the subject of a criminal prosecution, where again Petitioner was represented by the Attorney General. Petitioner presented the same evidence to the Corporation Commission which it now seeks to use in the criminal prosecution. Respondent forewarned Petitioner of potential double jeopardy problems by filing a motion on November 6, 1990, seeking dismissal of the criminal case. Despite this knowledge, Petitioner allowed the Corporation Commission to issue an order on November 29, 1990, requiring Respondent to pay restitution, to cease and desist trading activity, and to pay a $380,000.00 "administrative penalty". Petitioner took an "unjustifiable" risk that the penalties exacted by the Corporation Commission would be characterized as punitive in nature, thus barring the

criminal prosecution on double jeopardy grounds. The obligation of the State to "play fairly" was outlined by the dissent in Jones v. Thomas as follows:

> "The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but the embodiment of technical, prophylactic rules that require the Government to turn square corners. Whenever it is applied to release a criminal deserving of punishment it frustrates justice in the particular case, but for the greater purpose of assuring repose in the totality of criminal prosecutions and sentences. There are many ways in which these technical rules might be designed. We chose one approach in Bradley - undoubtedly not the only possible approach, but also not one that can be said to be clearly wrong. (The fact that it produces a "windfall" separates it not at all from other applications of the double jeopardy guarantee.) With technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out. The State broke the rules here, and must abide by the result. Supra at 2533.

Respondent has not and will not realize a "windfall" in this case. Respondent will only realize the results of a course of conduct chosen by the State.

B. The Petitioner Must Establish that the Administrative Penalty of $380,000.00 is not a Punitive Sanction.

The Petitioner argues that the $380,000.00 administrative penalty is not disproportionate to the damages allegedly caused to the State by Respondent, and therefore the penalty does not constitute punishment. There is no evidence before this Court, nor was any presented to the trial court, which indicates what,

if any, actual or approximate damages were suffered by the State. The Arizona Court of Appeals recognized this lack of an evidentiary basis for determining whether or not the $380,000.00 penalty was punitive in nature, and consequently remanded this matter to the trial court for a hearing on that issue. The Petitioner's argument herein is therefore premature.

The Petitioner wants this Court to conclude without the benefit of any evidence that the method of calculating the administrative penalty used by the Corporation Commission and the resulting penalty is on its face non-punitive and is sanctioned by the existing case law. The majority of cases cited by the State for this proposition, U.S. v. Halper, 109 S.Ct. 1902, Rex Trailer Co. v. U.S., 250 U.S. 148, 76 S.Ct. 219, 100 L.Ed. 149 (1956), U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943), Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), Karpa v. C.I.R., 909 F.2d 784 (4th Cir. 1990), and U.S. v. Bizzell, 921 F.2d 263 (10th Cir. 1990), involve situations where the government was in fact a "victim" of the defendant's alleged wrongful acts, and could show some type of actual monetary loss. In the above cited cases, the formula for assessing the penalties or total damages included references to the actual damages suffered.

In the instant case the cease and desist order and order of restitution can be characterized as remedial in nature. The $380,000.00 administrative penalty, however, has no proven remedial relationship to the damages, if any, suffered by the

State. In fact, the statute involved herein, A.R.S. §44-2036, provides a formula which makes no reference to the actual damages suffered, but rather provides a $5,000.00 penalty for each violation, regardless of the amount of damages. On its face, the statute at issue appears to be a punitive action employed by the Corporation Commission in an effort to enforce the Arizona securities regulations. Without further evidence of the damages to the State of Arizona, aside from damages or loss suffered by the investors, the $380,000.00 penalty can only be construed as punishment.

CONCLUSION

The order of the Arizona Court of Appeals remanding this matter to the trial court for further proceedings renders the decision a "non-final" judgment for purposes of this Court's jurisdiction. Additionally, the Arizona Court of Appeals correctly interpreted this Court's decision in U.S. v. Halper, and properly remanded the matter for an evidentiary hearing to determine the characterization of the $380,000.00 administrative penalty as remedial or punitive. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
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STATE OF ARIZONA)
) ss.
County of Pima)

DONALD S. KLEIN, a member of the bar of this Court, being duly sworn upon oath, deposes and says: that he served three (3) copies of the Response to Petition for Writ upon

Paul J. McMurdie
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, Arizona 85007

by depositing the same in the United States mail, with first class postage prepaid.

DATED this 23rd day of January, 1992.

Donald S. Klein
DONALD S. KLEIN
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this 23rd day of January, 1992, by DONALD S. KLEIN.

Marian P. Cornell
Notary Public

My Commission Expires:
My Commission Expires September 6, 1994